No. 10574

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JACK W. BAGLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

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DEFENDANT'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of conviction of the appellant by the District Court for the Southern District of California, and a jury thereof. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, Subdivision (a), First and Third and Subdivision (d).

Statement of the Case.

The appellant, a conscientious objector, was convicted in the Court below for a violation of the Selective Training and Service Act of 1940 under an indictment [Tr. of Rec. p. 2] which charged that he "did then and there knowingly and feloniously fail to comply with the order of his said Local Board No. 106, to report for induction . . ."

In the Court below and before the Selective Service Agencies, he claimed to be a conscientious objector and that he was entitled to a classification as such under the Selective Training and Service Law.

At the trial it was shown that the appellant had not received a hearing by the Hearing Officer such as the law granted him. Requested instructions on this point proffered by the appellant were refused by the Trial Court. To this rejection the appellant duly excepted. The particular instruction so refused, No. 8, is:

> "The denial of a full and fair hearing is the same thing as the denial of any hearing. Therefore, if you find that although the defendant was granted a hearing either by the local board or the hearing officer, if either of those hearings was not a full and fair one, but was merely perfunctory and was not in accord with the ordinary rules of decency and fair play, or not in accord with the Selective Service System Rules and Regulations, you will find the defendant not guilty."

Questions Involved.

I.

Is this case to be distinguished from *Falbo v. U. S.*?

II.

Was the refusal of the Trial Court to charge the jury as requested by defendant prejudicial error?

Specifications of Assigned Errors to Be Relied Upon.

The Transcript of Record, page 128, contains five assignments of error specified by attorneys for appellant.

The appellant now relies upon No. 3, to wit: The refusal to give instructions 1 to 15 inclusive, requested by the defendant.

ARGUMENT.

POINT I.

The Falbo Case Need Not Control the Case at Bar and Is Distinguishable From It.

The issues of the instant case do not necessarily challenge the *propriety* of the Draft Board's classification of the defendant, nor the Draft's Board's *power* to make any decision within the ambit of the Selective Training and Service Act of 1940.

The challenge of the present case lies in its *procedural failure,* in particular the Hearing Officer's mockery of a hearing, the issue of "due process" thus entering this case:

> The defendant, although assured by law a specified and valuable type of hearing [Tr. of Rec. p. 85], did not get it. [Tr. of Rec. pp. 88 to 92.] The law relating to this situation will be argued more fully in Point II of this brief.

We submit the *Falbo* case need not control the Court in any obvious and undebatable instance of an omission of an essential part of the Selective Service procedure. Let us suppose a board sought to expedite the draft procedure by giving a registrant an order to report for induction at the same time he was initially advised of his draft classification. The facts of the instant case do not differ in kind but only in degree with the above imaginary instance of ignoring the draft regulations. This point was made in the opinion in the *Monogahela Bridge Co. v. United States*, 216 U. S. 177, 195, to wit:

> "Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary

might be the action of executive officers proceeding under the Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law, for acts, whether done by governments or by individual persons, that violated natural justice or were hostile to the fundamental principals devised for the protection of essential rights of property."

This is also the situation in *Cobbledick v. United States*, 309 U. S. 323, squarely in point, where it is said:

> "At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim for his alternatives are to abandon the claim or languish in jail."

Also in *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio*, 301 U. S. 292, 304-305:

> "The right to such a hearing is one of the rudiments of fair play . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or cause of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

It has always been the laws that the Courts are not powerless to set aside an administrative determination in

such situations as this where Congress has not provided for judicial review.

Ng Fung Ho v. White, 259 U. S. 276;

Gegiow v. Uhl, 239 U. S. 3;

School of Magnetic Healing v. McAnulty, 187 U. S. 94;

Cf. R. F. C. v. Bankers Trust Company, 318 U. S. 163.

POINT II.

The Refusal of the Trial Court to Charge the Jury as Requested by the Appellant Was Prejudicial Error.

The 8th requested instruction, was in substance the provisions of Section 5 (g) of the Selective Training and Service Act of 1940 and Section 627.25 of the Selective Service Regulations received in evidence as Defendant's Exhibit B. These sections concerned the instructions and directions to registrants claiming exemption as Conscientious Objectors. These instructions came from the Department of Justice, Office of the Assistant Attorney General. The Court's attention is directed specifically to instruction 4 which reads as follows:

> "At the hearing, the registrant at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence."

This procedural regulation was clearly intended as a shield for the defendant. It also serves as one of the means of assuring confidence in the fairness of the mobilization process and in the respect given by our laws to the rights of conscience. This procedural step, one he is entitled to as a matter of right, definitely assures the conscientious objector an opportunity to meet accusations harmful to his assertion of conscience.

To the defendant in the instant case this assurance became a mockery. It is hardship enough to be unable to meet one's accusers face to face. It is worse yet to have no opportunity to deny or explain spiteful, anonymous accusations. Far more contrary to the spirit of our law is the instant situation where a man is promised an opportunity to refute or rebut any unfavorable "evidence" that might exist in the Hearing Officer's file and to be then falsely assured that there was no unfavorable evidence. Among gambling card players, this latter practice is termed "sandbagging."

It is not the ethics of the Government officials involved that is now complained of. Yet, at this point, it is well to recall the remarks of Chief Justice Hughes in *Morgan v. United States*, 304 U. S. 1, who recognized that the:

> ". . . Vast expansion of administrative agencies makes necessary that in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."

At another point the Court observed:

> "If these multiplying (administrative) agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and

endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

St. Joseph Stockyards v. United States, 298 U. S. 32, is in similar accord, as is

Yamatoya v. Fisher, 189 U. S. 86.

It is the defendant's claim that when he was denied a hearing of the character and scope promised him by the law he was given no hearing and having been given no hearing, he was denied "due process."

In the Transcript of Record, pages 88 to 92, we see that first, the Hearing Officer's questions to defendant were few and perfunctory and when asked if there was any evidence against defendant he replied "No." Second, that Hearing Officer's files actually contained considerable evidence that reflected adversely on the patriotism and sincerity of defendant, as well as indirect reflections on his character by attacks on his school and work record. Appellant did not know of the existence of the reports against him possessed by the Hearing Office until he started his appeal to the President. Then, at the office of the Draft Board he first saw the adverse reports, and, in his letter to General Hershey [Defendant's Exhibit p. 90, Tr. of Rec.] he points out their falsity and lack of foundation. Appellant never had the opportunity to make his denial and explanation to the Hearing Officer.

Denial of a full and fair hearing is the same thing as the denial of any hearing. (*U. S. ex rel. Vajteauer v. Commissioner of Immigation*, 273 U. S. 103; Sec. 623.1 (c) of Selective Service Rules and Regulations.) The denial of the requested instructions concerning lack of a

hearing deprived the defendant of "due process of law" within the meaning of the Fifth Amendment to the Constitution. (*Yamatoya v. Fisher* and *St. Joseph Stockyards v. United States,* cited above.)

The facts raised a material issue to be submitted to the jury.

When the evidence has raised a material issue and the Court refuses to charge the jury concerning it, there is a reversible error.

Weaver v. United States, 173 F. 912;
Gerson v. United States, 88 F. (2d) 358;
United States v. Stilson, 254 F. 120, 125.

Conclusion.

From the procedural provisions cited above it clearly appears that the appellant was entitled to a hearing before the Hearing Officer as a matter of right. It is settled law (*Yamatoya v. Fisher* and *St. Joseph Stockyards v. United States,* cited above) that such a hearing is a part of "due process" in this type of proceedings.

Respectfully submitted,

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